provisions that it believes the Commission should declare fall on either side of the filing line.

A. A "Schedule of Charges" and Related Service Descriptions Must Be Filed and Approved

As discussed above, Qwest believes that the touchstone of Section 252(a)(1) is its focus on "a detailed schedule of itemized charges for interconnection and each service or network elements included in the agreement." 20/ This statutory language reflects Congress's goal of limiting regulation when CLECs and ILECs are able to work out voluntary arrangements as in a standard business context. It follows that a negotiated arrangement should be filed for prior state commission approval insofar as it includes:

(i) a description of the service or network element being offered, with a focus on the functionality to be received by the interconnecting carrier;

(ii) the various options available to the requesting carrier (*e.g.*, the capacities of loops or transport trunks that are available) and any binding contractual commitments regarding the quality or performance of the service or network element; and

(iii) the rate structures and rate levels associated with each such option, including all applicable recurring and non-recurring charges, as well as any volume or term commitments that are necessary prerequisites for eligibility for a certain set of rates.

In addition, since the Commission has defined operational support systems ("OSS") to constitute a required network element, 21/ a description of the basic OSS functionalities and options to which an ILEC and a CLEC have agreed

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20/ 47 U.S.C. § 252(a)(1).

21/ *Local Competition Order*, 11 FCC Rcd at ¶ ____.

should be filed and subjected to state commission approval. But as discussed below, the specific details of OSS implementation, particularly provisions that are tailored to the needs of an individual carrier, need not be filed or approved.

B. Other Negotiated CLEC-ILEC Contract Arrangements Do Not Require Filing and Prior PUC Approval Under the Act's 90-day Process

On the other hand, Qwest submits that the Commission should hold that ILEC – CLEC matters going beyond a "schedule of charges" and related service descriptions are *not* subject to the Section 252(a)(1) filing and 90-day approval requirements. It is not practical to spell out all of the possible voluntary contractual arrangements that might arise between an ILEC and a CLEC. As local competition continues to grow, the spectrum of such arrangements is likely to grow as well. This is the way matters work in a normal unregulated business environment.

Again, the fact that Section 252(a) does not require a 90-day approval process for all terms does not mean that such matters are beyond regulatory reach. It only means that they can take effect once the CLEC and ILEC reach their negotiated agreement.

All that said, we can suggest at least some categories of CLEC – ILEC arrangements that should not require a 90-day process under the Act:

(i) contract provisions concerning business-to-business relationships, mechanics of how interconnection is provided to the specific CLEC, and administrative matters;

(ii) contract provisions concerning settlements of past disputes; and

(iii) contract provisions concerning regulated or unregulated services that are not subject to Section 251.

1. Agreements Defining Business Relationships and Business-to-Business Administrative Procedures

The Commission should clarify that Section 252(a)(1) does not contemplate public filing or state commission approval of negotiated arrangements concerning how the business-to-business relationship between ILECs and CLECs will be managed, nor arrangements regarding implementation or operational matters. For example, the following types of provisions (and other similar matters) should not be subject to the filing and 90-day approval processes:

- Escalation clauses – *e.g.*, contractual determinations that in the event of disagreement, specified individuals within the respective companies will be brought in to work things out.
- Dispute resolution provisions – *e.g.*, provisions specifying that, in the event the parties cannot resolve an ongoing disagreement, they agree to bring the dispute to commercial or regulatory arbitration, or that a particular judicial or regulatory forum will be selected for litigation.
- Administrative arrangements regarding the mechanics of provisioning, billing and other activities between the ILEC and CLEC.
- Arrangements for contacts between the parties – *e.g.*, commitments that certain individuals from the respective companies will meet, that the ILEC will provide OSS trainers to the CLEC at a particular location, or other specifics of account team support.
- Non-binding standards and statements of expectations regarding service quality or performance.

None of these provisions constitute "interconnection, services, or network elements pursuant to section 251," nor do they have anything to do with a "detailed schedule of itemized charges," and therefore the Act does not require any of them to be filed with or receive approval from state commissions. Requiring such agreements to be publicly filed and approved would deter ILECs from crafting business relationships and arrangements to meet the unique needs of particular interconnecting carriers, and would force them to rely on one-size-fits-all solutions to such matters. Such an inappropriate requirement could also result in a particular CLEC's business plans and unique needs to be publicly revealed, which would not serve the interests of competition. Most significantly, the procedural delay entailed by waiting for state commission approval – up to 90 days – could make it impossible for ILECs and CLECs to make even the most basic arrangements for their day-to-day business operations, which routinely require all sorts of agreements.

Escalation and dispute resolution provisions, in many cases, can define the overall relationship between two companies, and relate to matters having little or nothing to do with the rates, terms, or conditions of interconnection or network elements. For example, the Minnesota DOC complaint alleged Section 252 violations with respect to Qwest's failure to file its administrative escalation arrangements with two different CLECs. One of these arrangements provided for a *four*-level escalation process (*e.g.*, if the two companies' service representatives could not resolve an issue, it would be escalated to vice-presidents; from there, to

executive vice presidents; from there to CEOs; and from there to arbitration or litigation); the other provided for a *five*-level process with an additional layer of internal review. Similarly, the DOC complaint also alleges filing violations with respect to contract provisions in which Qwest agreed to weekly meetings between specified executives and similar administrative processes to review business questions and concerns. Other contractual provisions targeted by the complaint address matters such as whether disputes are to be addressed before a court of law, commercial arbitration panel, or state regulatory commission, and under what procedural and substantive legal rules.

Clearly, dispute resolution arrangements such as those listed above do not address a "schedule of charges" or the core terms of interconnection or network elements. Rather, they address the terms by which the companies are agreeing to do business and work out the inevitable disagreements that regularly arise in any business-to-business relationship. The Act anticipated and encouraged just this kind of responsiveness to specific CLEC needs as the requirements of a CLEC might change from time to time. Under Section 252(a), such arrangements are to take effect without PUC approval.

For similar reasons, the Commission should make it clear that detailed administrative procedures, whether relating to interconnection or other matters, need not be filed with or approved by state commissions. For example, in one case, Qwest Corp. agreed to provide, and the CLEC agreed to pay for, the services of a dedicated provisioning team from the ILEC to work on the CLEC's premises to

assist the CLEC with OSS matters (such as training CLEC personnel on how to correctly input data into the system. Qwest would submit that such a provision need not be filed or be subject to the state commission approval process. Nevertheless, given the ambiguity of Section 252(a), Qwest and the CLEC had filed it with the Minnesota PUC, and had obtained the PUC's approval. Even so, the Minnesota DOC alleged a Section 252 violation because Qwest had not filed the separate agreement containing implementation provisions such as the number and pay grades of the Qwest personnel to be detailed to the CLEC's premises. The Commission should issue a ruling to preclude such blatant over-reaching.

In sum, Qwest, like any vendor, tailors its implementation processes to meet the varying needs of its CLEC customers. The Commission should make it clear that there is no basis for requiring all this administrative detail to be filed with and approved by state commissions. To the contrary, negotiated variations in business-to-business administrative processes are acceptable within the framework of the Telecommunications Act and should not be subject to the Section 252 filing or state commission approval requirements

2. Settlement Agreements

Settlement agreements that resolve disputes between ILECs and CLECs over billing or other matters are not interconnection agreements under Section 252, and in any event are not subject to the 90-day approval process in Section 252(a)(1). This should hold true even if the dispute related to elements or services that are subject to Section 251 and 252, and part of an interconnection agreement. For example, Section 252(a)(1) should not apply to settlement

agreements providing for the payment of a lump sum to resolve disputes between parties over the quality of interconnection services provided in the past, or to resolve disputes over billing or payments for such services. This would be consistent with the Commission's historic treatment of settlement agreements relating to tariffed services: settlement payments need not be tariffed, and do not violate the statutory prohibition of unreasonable discrimination. 22/ It stands to reason, consistent with Congressional intent, that negotiated agreements under Section 252 should be less inclusive than historically micro-managed tariffs; thus, the case is even stronger that such settlement provisions should not be subject to the Section 252(a)(1) filing or approval requirements.

Moreover, applying Section 252(a)(1) to settlement agreements would disserve the public interest, because requiring public disclosure and third-party access to the terms of settlement agreements would deter parties from settling their disputes. Clearly, the public interest favors amicable dispute resolution. 23/ And deterring parties from entering settlements would force regulators and courts to

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22/ *Allnet Communications Services, Inc. v. Illinois Bell Tel. Co.*, 8 FCC Rcd 3030, 3037, ¶¶ 32-33 & n.78 (1993) (rejecting contention that award of damages to a customer in a complaint case, or a carrier's payment to a customer in settlement of such a dispute, constitutes violation of non-discrimination duty).

23/ *See, e.g., McDermott v. AmClyde and River Don Castings, Ltd.*, 511 U.S. 202 (1994) ("public policy wisely encourages settlements", *id.* at 215, and a rule that "discourages settlement and leads to unnecessary ancillary litigation" is "clearly inferior" to one that promotes settlement of disputes, *id.* at 211); *accord, Bergh v. Dept. of Transportation*, 794 F.2d 1575, 1577 (Fed. Cir. 1986), *citing United States v. Contra Costa County Water District*, 678 F.2d 90, 92 (9th Cir. 1982); *Stotts v. Memphis Fire Dept.*, 679 F.2d 541, 565 (6th Cir. 1982); *Airline Stewards & Stewardesses Ass'n v. American Airlines*, 573 F.2d 960, 963 (7th Cir. 1978); *Florida Trailer & Equipment Co. v. Deal*, 284 F. 2d. 567, 571 (5th Cir. 1960).

resolve many more disputes that could have been settled by the parties. Not only would this be administratively burdensome, but more importantly, it could well lead to the imposition of solutions that may be inferior to those that the parties could have worked out on their own.

3. Agreements Regarding Matters Not Subject to the 1996 Act

The Commission has already held that the substantive and procedural requirements of Sections 251 and 252 do not apply to purely interstate matters within the FCC's traditional, pre-1996 jurisdictional domain, such as interstate access services. 24/ It should reaffirm that conclusion. Moreover, the Section 251 and 252 requirements also do not apply to local retail services and intrastate long distance service, which are the province of the state commissions under pre-1996 state law. 25/ Nor do the Section 251/252 rules apply to network elements, such as local switching for large business customers in major metropolitan areas, that the FCC has concluded do not qualify for unbundling under the "necessary" and "impair" standards of Section 251(d)(2), 26/ nor to the transport and termination of

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24/ *See, e.g., Local Competition Order*, 11 FCC Rcd at ¶¶ 191, 873, 1033-34. *See also Competitive Telecommunications Association v. FCC*, 117 F.3d 1068 (8th Cir. 1997).

25/ *Local Competition Order*, 11 FCC Rcd at ¶ 1035; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151, n.66 (2001) ("*ISP-Bound Traffic Remand Order*").

26/ *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 ¶¶ 469-72 (1999) ("*UNE Remand Order*") (noting that Section 252 pricing rules do not apply to network elements that

non-local types of traffic, such as information access. 27/ In light of these strong precedents, the Commission should make it clear that agreements concerning services or elements that are not under the Section 251/252 regulatory framework need not and *should* not be treated as interconnection agreements that must be filed with state commissions under Section 252(e)(1). And it should be beyond doubt that, with the exception of reciprocal compensation for local traffic, services that *ILECs* purchase from *CLECs* are not subject to Sections 251(c) and 252. Moreover, in the case of voluntary agreements that contain both provisions relating to elements and services subject to Sections 251, and elements or services not subject to the statute, the Section 252(a)(1) filing and approval process should extend *only* to rates and service descriptions regarding the former.

CONCLUSION

For the foregoing reasons, Qwest respectfully requests that the Commission expeditiously grant its Petition for Declaratory Ruling.

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have been removed from the national list of elements subject to mandatory unbundling, even if those elements continue to be included in the Section 271 competitive checklist)

27/ *ISP-Bound Traffic Remand Order*, 16 FCC Rcd at 9189, ¶ 82 ("[C]arriers may no longer invoke section 252(i) to opt into an existing interconnection agreement with regard to the rates paid for the exchange of ISP-bound traffic. Section 252(i) applies only to agreements arbitrated or approved by state commissions pursuant to section 252; it has no application in the context of an intercarrier compensation regime set by this Commission pursuant to section 201.").

Respectfully submitted,

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